

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

CORRECTED COPY

76-1236

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

MANUEL FRANCISCO PADILLA MARTINEZ,

Appellant.

Docket No. 76-1236

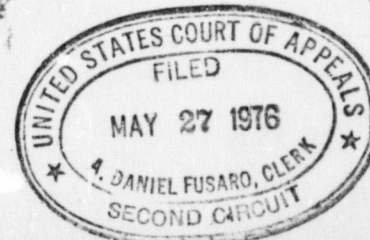
BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MANUEL FRANCISCO PADILLA
MARTINEZ

FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
JACK LIPSON,
Of Counsel.



CONTENTS

Table of Cases and Other Authorities Cited	i
Question Presented	1
Statement Pursuant to Rule 28(a)(3)	
Preliminary Statement	2
Statement of Facts	3
Argument	
The excludable periods of 18 U.S.C. §3161 do not apply to prevent the release under §3164 of a de- fendant in continuous custody for more than ninety days prior to trial	5
Conclusion	13

TABLE OF CASES

<u>Rewis v. United States</u> , 401 U.S. 808 (1971)	9
<u>United States v. Soliah</u> , E.D.Cal. No. 75-523	12
<u>United States v. Tirasso</u> , No. 76-1571 (9th Cir., March 26, 1976)	12

OTHER AUTHORITIES

H. Rep. No. 93-1058, 93rd Cong., 2d Sess. (1974)	9
S. Rep. No. 93-1021, 93rd Cong., 2d Sess. (1974)	8
Ballentine's LAW DICTIONARY (3d ed. 1969)	11
Black's LAW DICTIONARY (4th ed. 1951)	11

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

MANUEL FRANCISCO PADILLA MARTINEZ,

Appellant.

Docket No. 76-

BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether the excludable periods of 18 U.S.C. §3161(h) apply to prevent the release under §3164 of a defendant in continuous custody for more than ninety days prior to trial.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from an order of the United States District Court for the Southern District of New York (The Honorable Robert L. Carter, District Judge) entered on May 24, 1976, denying a motion pursuant to 18 U.S.C. §3164 for release of appellant Manuel Francisco Padilla Martinez pending trial.

The Legal Aid Society, Federal Defender Services Unit, was assigned by the District Court as counsel for Mr. Martinez at trial, and continues as counsel on appeal.

Statement of Facts

On February 19, 1976, appellant Manuel Francisco Padilla Martinez was indicted along with several others, and charged in Indictment 76 Cr. 164 with violations of the Federal narcotics laws (see Appendix A). On that same day appellant was arrested by Federal agents and taken into custody. On February 20, 1976, he was arraigned before The Honorable Gerard L. Goettel, then a United States Magistrate for the Southern District of New York, and held on \$50,000 bail.

At the time of his arrest, appellant Martinez had been in the custody of the State of New York for a period of more than sixteen months in connection with State charges arising from the same series of events which are the basis of Indictment 76 Cr. 164. The arrest which resulted in appellant's New York State custody was made by a Joint Task Force of Federal and State agents. Neither appellant Martinez nor any of his co-defendants has been brought to trial on any of the State charges. As of the filing of this appeal, appellant Martinez has been in continuous custody for a period of more than nineteen months.

On March 31, 1976, a pretrial conference was held before Judge Robert L. Carter. At that conference all counsel were instructed that trial would commence as to all defendants by May 17, 1976. On March 24, 1976, a motion to dismiss the indictment for failure to provide a speedy trial had been filed.

On April 1, 1976, in accord with the court-ordered schedule, a motion to suppress was filed. No further court proceedings were held with respect to this indictment until May 17, 1976. On that day the Assistant United States Attorney and counsel for appellant Martinez as well as counsel for other co-defendants appeared, and hearings were commenced with respect to numerous pretrial motions which had been filed by defense counsel within the time set by the District Court. These hearings continued through May 21, 1976.

On May 20, 1976, counsel for appellant Martinez moved, pursuant to 18 U.S.C. §3164 and Rules 3 and 4 of the Southern District Plan for Achieving Prompt Disposition of Criminal Cases ("Interim Plan"), for appellant's release. Counsel asserted that, since it was the ninety-first day since appellant's arrest, the above-cited statute and rules required his release. Judge Carter reserved decision on the application.

On May 21, 1976, Judge Carter informed appellant Martinez that his application had been denied and, on May 24, 1976, the Judge filed a written opinion (Appendix B). In the opinion, Judge Carter found that the excludable periods of 18 U.S.C. §3161 apply to §3164, thereby bringing the trial within the ninety-day period.

On May 24, 1976, the trial began with selection of a jury.

On May 25, 1976, a notice of appeal from Judge Carter's order denying release was filed.

ARGUMENT

THE EXCLUDABLE PERIODS OF 18 U.S.C. §3161 DO NOT APPLY TO PREVENT THE RELEASE UNDER §3164 OF A DEFENDANT IN CONTINUOUS CUSTODY FOR MORE THAN NINETY DAYS PRIOR TO TRIAL.

Under the Speedy Trial Act of 1974, 18 U.S.C. §3164, detained persons held solely for trial must be tried within ninety days following the beginning of their continuous detention. The failure to commence a trial within that time through no fault of the accused or his attorney requires the defendant's release from custody. Section 3164 contains no qualifying provisions, no excludable periods, and no limitations on the requirement that the detained person be released from custody.

Despite the clear, plain, and unambiguous language of the statute, the District Judge, unsatisfied with the necessity of releasing appellant Martinez on bail, chose to apply the excludable periods of §3161(h) to the interim time.* However, a reading of the entire statute and the statutory history yields no support for the proposition that the excludable periods of §3161 are applicable to §3164.

*Judge Carter found that the period of custody exceeded ninety days and that the delay was not the fault of counsel. Opinion at 4.

Judge Carter made much of the fact that the excludable periods of §3161(h) apply to the §3161(b) and (c) time period of one hundred days between arrest and trial. He felt it was an obvious oversight not to apply them to the shorter ninety-day period of §3164.

However, the time limits of §3161 apply to all cases, but do not apply until July 1, 1979. Prior to that date, time periods apply on a modified schedule. 18 U.S.C. §3161(f).^{*} This delay was intended as a gearing-up period. The interim time limits of §3164 cover the period until July 1, 1979 -- a period in which there are other statutory time periods in effect but when the Government is subject to no other statutory sanctions. Further, the §3164 periods apply to only a limited number of unique cases involving custody and "high risk" designation.

The two sections -- §3161 and §3164 -- are clearly effective at different times and for different purposes. They are intended to establish different schemes for the pre-July 1, 1979, period and the post-July 1, 1979, period. Congress was not trying to equalize the time periods or the applicability of the statute. Rather, in the period before July 1, 1979, Congress was dealing with only a small number of cases which required immediate attention.

^{*}The times, at various periods from July 1, 1976, to July 1, 1979, go from a maximum of 250 days to 175 days to 125 days. 18 U.S.C. §§3161(f), (g); 3163(a), (b).

Evidence of the difference in scheme is shown by the sanctions for violations of §3161 and §3164. Section 3164 contains its own sanction -- the single one requiring release from custody. Section 3162, by specific reference to §3161(b), (c), and, significantly, to (h), requires dismissal of the indictment for failure to comply with §3161, and this sanction is not effective until July 1, 1979, when the sanction under §3164 expires. Annexed to this brief is a table prepared by the Administrative Office of the United States Courts graphing the time periods involved. It must be noted that on this chart the Administrative Office denotes no excludable periods for §3164 violations.

The legislative history to which Judge Carter points supports appellant's position. The Report of the Senate Judiciary Committee on S.754 states:

Section 3164 would require jurisdictions to implement interim plans within three months of enactment to remain in effect until the effective date of the 90-day time limits of subsection 3161(b) and (c). (See Calendar of Implementation, Chart 1, p. 55). These interim plans must provide that all detained defendants and all released defendants considered to be "high risk" by the United States attorney be released within 90 days.

Section 3164 has been added to title I of the legislation as a result of the suggestion by Professor Freed that certain minimal speedy

trial requirements be placed into operation soon after enactment and until the courts are prepared to implement the mandatory time limits. These interim plans would be similar to the plan adopted by the United States Court of Appeals for the Second Circuit. (See Section IV. Discussion, pp. 17-20.) The section would require trials within 90 days for pretrial detainees or "high risk" defendants who are on pretrial release, pending the full effectiveness of sections 3161 and 3162. The sanctions for failure to adhere to the limits would not be dismissal, as in section 3162, but pretrial release in the case of detainees and review of release conditions in the case of high risk releasees. The provision would not apply to detainees who have already been convicted of another offense because independent grounds for their detention exist.

S. Rep. No. 93-1021, 93rd
Cong., 2d Sess., at 44-45
(1974).

At another place, the report states:

This section [3164] would require jurisdictions to implement interim time limits within three months of enactment, to remain in effect until the effective date of the time limits of subsections 3161(b) and (c). (See Calendar of Implementation, Chart 1, p. 55.) These interim plans must provide that all detained defendants and all released defendants considered to be "high risk" by the United States attorney be tried within 90 days. The sanction for failure to try detained defendants within 90 days would be release....

Id. at 27.

The House Report makes the same substantive statement:

During the first four years under the bill, interim time limits are provided for the trial of individuals detained and those released pending trial who have been designated by the attorney for the Government as

being of "high risk." This section would require the trial of these individuals within 90 days following the beginning of detention or designation as "high risk." Moreover, any persons designated "high risk" or detained before the effective date of the interim time limits, is entitled to be brought to trial within 90 days from the date this section becomes effective. The interim time limits become effective 90 days after enactment of the bill. Failure to commence the trial of a detained person under this section results in the automatic review of the terms of release by the court and, in the case of a person already under detention, release from custody. [Section 3164]

H. Rep. No. 93-1058, 93rd
Cong., 2d Sess., at 23
(1974).

No reference is made to excludable periods, and the absence of any such reference is indicative of the non-inclusion of the excluded periods. Rewis v. United States, 401 U.S. 808, 812 (1971).

Judge Carter's reliance on Congressional reference to the earlier Second Circuit Rules Regarding Prompt Disposition of Criminal Cases Pursuant to 28 U.S.C. §322 (effective May 24, 1971) and the Southern District Plan for Achieving Prompt Disposition of Criminal Cases Pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure (effective April 1, 1973) does not support his conclusion that the §3161 excludable periods apply. Congress obviously had before it the Second Circuit models providing for continued custody in "exceptional circumstances" and application of excludable periods, and chose not to adopt the language of the models. Further, the quoted Senate

Report not only states that the interim plans prepared under §3164 would be similar, not identical, to the Second Circuit plans, but that sentence does not refer to the statute.*

Under the Interim Plan promulgated by the Southern District of New York pursuant to §3164, Rule 3 requires the commencement of a trial within ninety days of a defendant in continuous custody for that period. Under Rule 4(a)(1), the failure to commence a trial within that time requires that the defendant be released from custody. There are no conditions or excludable periods listed.

Rule 5 of the Southern District Plan, carrying forward the provisions of earlier Second Circuit speedy disposition plans, requires the Government's readiness for trial within six months in all cases. The sanction for the Government's failure to be ready in that time is dismissal with prejudice. In determining whether the time schedule is complied with, Rule 5 specifically refers to the excluded periods listed in

*Judge Carter did not rule on the argument that appellant's detention should be considered to have begun at the moment of his arrest by a Federal-State Joint Task Force, some sixteen months before the transfer of appellant to MCC on charges arising from the same alleged conduct which forms the basis of the charges in this case. The decision to arrest, to process the case in the State courts, and to transfer the case to Federal jurisdiction was participated in by the Federal authorities, who knew where appellant and his co-defendants were located. The State custody was for the trial of crimes resulting from the alleged conduct which produced the Federal violations. The decision first to seek to try the case in the State courts having been participated in by Federal authorities, the term of State custody comes within §3164. Thus, the total period of custody is substantially longer than ninety days.

Rule 6. Rule 6, in turn, refers to Rule 5. Neither Rule 5 nor Rule 6 refers to Rules 3 or 4, and Rules 3 and 4 make no reference to Rules 5 and 6.

Thus, the Southern District Interim Plan carries forward from the former Prompt Disposition Plans of the Second Circuit and the Southern District dismissal based on the Government's lack of readiness, a sanction effective in the Southern District since May 24, 1971. That sanction is not based on commencement of trial, as is the sanction in the statute, apparently because the statute does not require any sanction at all until July 1, 1979. On the other hand, under the Interim Plan release on bail is required when the trial is not commenced within ninety days, without any exceptions. This is a change from the earlier Second Circuit and Southern District Plans which required release only if the Government was not ready to proceed to trial, considering excludable periods. The statute mandates the difference between the new Interim Plan and the earlier Prompt Disposition Plans.

Commencement of the trial in this case does not preclude the relief sought. The statute reads:

No detainee shall be held in custody pending trial after the expiration of the 90 day period required for commencement of trial.

"Pending" is defined as "begun but not yet completed, during; before the conclusion of...." Black's LAW DICTIONARY at 1291 (4th ed. 1951); see also Ballentine's LAW DICTIONARY at 929, 930 (3d ed. 1969). Thus, the right to be released on bail

accrued when the trial did not begin on the ninetieth day of custody, and is not terminated until the trial is completed by a judgment.

As Judge Carter noted, two decisions have adopted the position advanced here by appellant. In United States v. Tirasso, No. 76-1571 (9th Cir., March 26, 1976) (Appendix C), and United States v. Soliah, E.D.Cal. No. 75-523 (Appendix D), the courts found the language of §3164 to be straightforward and unambiguous and the legislative history clear, and both courts required release. They both found that there was no basis for applying the excludable periods of §3161 to §3164.

Judge Carter indicated that he believes appellant or some of his co-defendants will flee if they are released on bail. Opinion at 16-17. This consideration is irrelevant to the application of the statute. United States v. Tirasso, supra. What is more, appellant Martinez is a legal, permanent resident of the United States.

The unambiguous language of the statute, the legislative scheme, and the legislative history make clear that the excludable periods of §3161(h) do not apply to §3164. Accordingly, the order of the court below should be reversed and appellant Martinez ordered released on appropriate bail conditions.

CONCLUSION

For the foregoing reasons, the order of the District Court should be reversed and appellant ordered released from custody.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MANUEL FRANCISCO PADILLA
MARTINEZ
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,
JACK LIPSON,
Of Counsel.

CERTIFICATE OF SERVICE

I certify that a copy of this corrected brief has been delivered by messenger to Fred Davis, Assistant U.S. Attorney for the Southern District of New York.

Phyllis S. Klotz Barlow

May 27, 1976